Supreme Court, U.S.
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No. 06-5618

In The Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX VOLUME I

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RELEVANT DOCKET ENTRIES*

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF MISSOURI

07/29/2004	1	Indictment referred to Magistrate Judge Buckles as to Mario Claiborne (1) count(s) 1. (Attachments: #1 Criminal Cover Sheet) (KLK,) (Entered: 07/30/2004)
09/08/2004	18	Order Setting Conditions of Release as to Mario Claiborne (1) $10,000 secured by 10% Signed by Judge Terry I. Adelman on 9/8/04. (KLH,) (Entered: 09/10/2004)
10/07/2004	31	Superseding Indictment as to Mario Claiborne Referred to Magistrate Judge Frederick R. Buckles as to Mario Claiborne (1) count(s) 1s, 2s. (Attachments: #1 Criminal Cover Sheet) (CDD,) (Entered: 10/08/2004)
12/03/2004	43	Minute Entry for Change of Plea Hearing proceedings held before Judge Donald J. Stohr as to Mario Claiborne; Plea of Guilty entered on Counts 1s, 2s. NO PLEA AGREEMENT FILED; Stipulation filed and was adopted and approved; Probation Officer in court: Linda Rogoz; Objections to Presentence Report due by 2/4/2005. Sentencing set for 2/25/2005 02:30 PM in Courtroom 16S before Honorable Donald J. Stohr. (Court Reporter or FTR Gold Operator initials: Patti Dunn Wecke.) (proceedings

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

started: 2:07.) (proceedings ended: 2:22.) (Defendant Location: Bond.) (KKS,) (Entered: 12/06/2004)

12/03/2004 44 Stipulation of Factual Basis for Guilty Plea by USA, Mario Claiborne as to Mario Claiborne (KKS,) (Entered: 12/06/2004)

03/11/2005 48 Objection to Presentence Investigation Report by Mario Claiborne (Dwyer, Michael) (Entered: 3/11/2005)

03/25/2005 50 Response to Objection to Presentence Investigation Report by USA as to Mario Claiborne (Stevens, Cristian) (Entered: 3/25/2005)

03/27/2005 51 Sentencing Memorandum – *Reply to Government's Sentencing Memorandum and Response to Defendant's Objections to the Presentence Report* by defendant Mario Claiborne (Dwyer, Michael) (Entered: 3/27/2005)

03/28/2005 53 Judgment as to Mario Claiborne (1), Count(s) 1s, Deft. pled guilty on 12/3/04. Imprisonment – 15 months to run concurrently to Count II. Recommendations – incarceration as close to the St. Louis, MO area as possible. Deft. remanded. Supervised release – 3 years. See judgment for additional terms of supervised release terms. Special assessment of $100 due immediately. Count(s) 2s, Pled guilty on 12/3/04. Imprisonment – 15 months to run concurrently with Count I. Recommendations – same as Count I. Supervised release and additional supervised release terms – same as Count I. Special assessment of $100 due immediately. Signed

by Judge Carol E. Jackson on 3/28/05. (LGK,) (Entered: 3/29/2005)

4/21/2005 56 Original Transcript (Pilot) as to Mario Claiborne proceedings of Sentencing Hearing held on 3/28/05 before Judge Carol E. Jackson. Court Reporter: G. Bond. The transcript filed with the court will not be remotely available until such time as the period for redaction has expired or a request for redaction has received and the redacted transcript filed. For additional information see the Notice/Instructions to the Bar regarding Electronic Availability of Criminal Transcripts on the Court's website at www.moed.uscourts.gov (KCM,) (Entered: 4/21/2005)

04/25/2005 57 Notice of Appeal by USA as to Mario Clairborne re 53 Judgment, Filing fee $ no fee required. (Stevens, Cristian) (Modified on 4/26/2005) (LJK,). (Entered: 04/25/2005)

06/20/2006 75 Order granting 72 Motion to Continue as to Mario Claiborne (1) pending dft's petition for writ of certiorari. Signed by Judge Carol E. Jackson on 6/20/06. (LLW,) (Entered: 06/20/2006)

UNITED STATES COURT OF APPEALS
for the
EIGHTH CIRCUIT

05/03/2005	Criminal Case Docketed Dist. Ct. Office: St. Louis, Missouri (dlb)
02/27/2006	THE COURT: James B. Loken, Roger L. Wollman, William J. Riley. OPINION FILED by James B. Loken, Authoring Judge Published. [05-2198] [2013890] (mer)
02/27/2006	JUDGMENT: James B. Loken, Roger L. Wollman, William J. Riley. :REMANDED to the district court for resentencing [05-2198] [2013892] (mer)
03/27/2006	PETITION FOR REHEARING with petition for rehearing en banc. Filed by Appellee Mario Claiborne, w/ service 3/27/06., TO COURT [05-2198] (srd)
04/27/2006	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [2026700-1] filed by Mario Claiborne. Petition for panel Rehearing is also denied. Judge Bye and Judge Smith would grant the petition for rehearing en banc. Judge Gruender did not participate in the consideration or decision of this matter. [05-2198] [2038249] (srd)
05/10/2006	MANDATE ISSUED [05-2198] (srd)
08/07/2006	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 07/26/06. Supreme Ct. Case No.: 06-5618 [05-2198] [2077167] (srd)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 4:04 CR 00423DJS
MARIO CLAIBORNE,	)	
Defendant.	)	

INDICTMENT

(Filed Jul. 29, 2004)

COUNT ONE

A. The Grand Jury charges that:

On or about November 2, 2003, in the City of St. Louis, within the Eastern District of Missouri,

MARIO CLAIBORNE,

the Defendant herein, did knowingly and intentionally possess with the intent to distribute in excess of five grams of a mixture or substance containing a detectable amount of cocaine base (crack), a Schedule II narcotic controlled substance drug.

In violation of Title 21, United States Code, Section 841(a)(1), and punishable under Title 21, United States Code, Section 841(b)(1)(B)(iii).

B. Pursuant to Title 28, United States Code, Section 994, and the United States Sentencing Guidelines promulgated in accordance therewith, the Grand Jury further charges

the following offense conduct and factors relevant to the offense charged in paragraph A:

The quantity of cocaine base (crack) for which the Defendant is responsible is at lease five grams but less than twenty grams, thereby making the offense punishable under United States Sentencing Guidelines Section 2D1.1(c)(7).

The Defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, thereby making the offense punishable under United States Sentencing Guidelines Section 3C1.2.

A TRUE BILL.

/s/ William A. Miller
FOREPERSON

JAMES G. MARTIN
United States Attorney

/s/ Christian M. Stevens
CHRISTIAN M. STEVENS, #98871
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. S1-4:04 CR 423 DJS (FRB)
MARIO CLAIBORNE,	)	
Defendant.	)	

FIRST SUPERCEDING INDICTMENT

(Filed Oct. 7, 2004)

COUNT ONE

A. The Grand Jury charges that:

On or about May 14, 2003, in the City of St. Louis, within the Eastern District of Missouri,

MARIO CLAIBORNE,

the Defendant herein, did knowingly and intentionally distribute a quantity of a mixture or substance containing a detectable amount of cocaine base (crack), a Schedule II controlled substance drug.

In violation of Title 21, United States Code, Section 841(a)(1), and punishable under Title 21, United States Code, Section 841(b)(1)(C).

B. Pursuant to Title 28, United States Code, Section 994, and the United States Sentencing Guidelines promulgated in accordance therewith, the Grand Jury further charges the following offense conduct and factors relevant to the offense charged in paragraph A:

The quantity of actual cocaine base (crack) for which the Defendant is responsible is less than 250 milligrams of cocaine base (crack), thereby making the offense punishable under United States Sentencing Guidelines Section 2D1.1(c)(14).

COUNT TWO

A. The Grand Jury further charges that:

On or about November 2, 2003, in the City of St. Louis, within the Eastern District of Missouri,

MARIO CLAIBORNE,

the Defendant herein, did knowingly and intentionally possess in excess of five grams of a mixture or substance containing a detectable amount of cocaine base (crack), a Schedule II controlled substance drug.

In violation of Title 21, United States Code, Section 844(a).

B. Pursuant to Title 28, United States Code, Section 994, and the United States Sentencing Guidelines promulgated in accordance therewith, the Grand Jury further charges the following offense conduct and factors relevant to the offense charged in paragraph A:

The quantity of actual cocaine base (crack) for which the Defendant is responsible more than five grams but less than 20 grams of cocaine base (crack), thereby making the offense punishable under United States Sentencing Guidelines Sections 2D2.1(b)(1) and 2D1.1(c)(7).

The Defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, thereby making the offense punishable under United States Sentencing Guidelines Section 3C1.2.

A TRUE BILL.

/s/ Jen Jensen
FOREPERSON

JAMES G. MARTIN
United States Attorney

/s/ Christian M. Stevens
CHRISTIAN M. STEVENS, #98871
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 4:04 CR 423 DJS
MARIO CLAIBORNE,	)	
Defendant.	)	

STIPULATION OF FACTUAL BASIS FOR GUILTY PLEA

(Filed 12/03/2004)

Defendant Mario Claiborne, through his attorney, Assistant Federal Public Defender Michael Dwyer, and the United States of America, through Assistant United States Attorney Cristian M. Stevens, stipulate as follows:

1. There is no plea agreement in this case. Defendant will plead guilty to both counts in the superseding indictment, admitting the statutory elements constituting the violations charged in the superseding indictment: (1) distribution of 0.23 grams of crack cocaine on May 14, 2003, a violation of 21 U.S.C. §841(a)(1), charged in Count One of the superseding indictment and (2) possession of 5.03 grams of crack cocaine on November 2, 2003, a violation of 21 U.S.C. § 844(a), charged in Count Two of the superseding indictment.

2. **ELEMENTS OF THE OFFENSES**

A. As to Count One, Defendant admits to violating 21 U.S.C. § 841(a)(1), the elements of which are:

1. Defendant intentionally transferred a quantity of cocaine base (crack) to another person; and

2. At the time of the transfer, Defendant knew he was transferring cocaine base (crack).

B. As to Count Two, Defendant admits to violating 21 U.S.C. § 844(a), the elements of which are:

1. Defendant possessed cocaine base (crack);

2. Defendant knew that he possessed cocaine base (crack); and

3. He possessed more than 5 grams of cocaine base (crack).

3. STATUTORY PENALTIES

The maximum possible penalty for Count One is imprisonment of not more than 20 years, a fine of not more than $1,000,000, or both. The Court shall also impose a period of supervised release of not less than three years and impose a special assessment of $100.

The maximum possible penalty for Count Two is imprisonment of not less than five years or more than 20 years, a fine of at least $1,000, or both. The Court may also impose a period of supervised release of not more than three years and a special assessment of $100.

4. SUPERVISED RELEASE

Defendant understands that the Court, pursuant to 18 U.S.C. § 3583 and Sentencing Guidelines §5D1.1-§5D1.2, may impose a term of supervise release to follow any term

of imprisonment. The Court will impose standard conditions upon Defendant and may impose special conditions concerning Defendant if the Court deems them necessary. Defendant will be required to adhere to these conditions. He understands that violation of any condition of supervised release may cause the Court to revoke his supervised release. Revocation of supervised release may result in his being required to serve a term of imprisonment equal to, but not greater than, the term of supervised release. If his supervised release is revoked, Defendant will not receive credit for time already served on supervised release.

Defendant understands that parole has been abolished. If the Court imposes a term of imprisonment, he will serve the entire term less any "good time" he earns pursuant to 18 U.S.C. § 3624.

5. MANDATORY SPECIAL ASSESSMENT

The Court is required, under 18 U.S.C. § 3013, to impose a mandatory special assessment of $100 per count for a total of $200. Defendant agrees to pay the special assessment at the time of sentencing. If, however, he is unable to pay this special assessment at sentencing, he agrees that any money paid toward restitution or other fine will first be used to pay the mandatory special assessment.

6. FINES, RESTITUTION, AND COSTS

The Court may impose a fine, restitution, costs of incarceration, and costs of supervision. Defendant understands that any fine or restitution that the Court imposes is due immediately. He also understands that any fine,

restitution, or special assessment that the Court imposes can not be discharged in bankruptcy under any circumstances.

7. POSSIBILITY OF DETENTION

Defendant acknowledges that upon entering his plea of guilty to the two counts of the superseding indictment, he may be subject to immediate detention pursuant to 18 U.S.C. § 3143.

8. ACKNOWLEDGMENT AND WAIVER OF DEFENDANT'S RIGHTS

Defendant acknowledges and understands the following rights: the right to plead not guilty; the right to be tried by a jury in a public and speedy trial; the right to file pre-trial motions, including motions to suppress evidence; the right to the presumption of innocence at trial; the right to require the government to prove the case against Defendant beyond a reasonable doubt; the right not to testify; the right not to present any evidence; the right to be protected from compelled self-incrimination; the right to confront and cross-examine witnesses at trial; the right to testify and present evidence; and the right to compel the attendance of witnesses. He understands that by his guilty plea, he waives all of these rights.

Defendant further understands that he has the right to be represented by counsel. If necessary the Court will appoint counsel at trial and every other stage of the proceedings.

Defendant's attorney has explained all of these rights and the consequences of waiving or giving up these rights.

Defendant understands that by pleading guilty, no trial will occur and that the only remaining action to be taken by the Court is the imposition of sentence.

Defendant and his attorney have reviewed the government's evidence and discussed the government's case. Further, they have discussed possible defenses and defense witnesses. Defendant is satisfied that his attorney has provided effective assistance of counsel.

9. PRESENTENCE INVESTIGATION REPORT

Defendant understands that the Court will order the Probation Office to prepare a Presentence Investigation Report following his guilty plea. The parties reserve the right to allocution at sentencing and the right to bring any misstatements made by any party or on that party's behalf to the attention of the Court at the time of sentencing.

10. FACTUAL BASIS FOR THE PLEA

As to Count One, Defendant knowingly and intentionally distributed 0.23 grams of cocaine base (crack) to an undercover St. Louis Metropolitan Police officer on May 14, 2003. The distribution occurred in the area of Itaska and 37th Street in the City of St. Louis, which is within the Eastern District of Missouri. Defendant exchanged a clear plastic bag containing cocaine base (crack) for a $20 bill. He was arrested immediately after this transaction.

As to Count Two, Defendant knowingly and intentionally possessed 5.03 grams of cocaine base (crack) on November 2, 2003. While standing on the front porch at 3455 Oregon, in the City of St. Louis, which is within the Eastern District of Missouri, Defendant threw a clear

plastic bag, which appeared to contain cocaine base (crack), in the presence of two St. Louis Metropolitan Police officers, who were approaching the porch. After tossing the bag to the ground, Defendant entered 3455 Oregon. He remained inside for a short period before exiting the rear of the residence and fleeing from the police on foot. Police retrieved the bag they had seen Defendant toss from the front porch of 3455 Oregon and, after laboratory analysis, determined that it contained 5.03 grams of cocaine base (crack).

11. **SENTENCING GUIDELINES:** The parties' position on application of the Guidelines is as follows, with both parties understanding that their recommendations are not binding upon the Court:

A. **Guidelines Manual to be Used:** The Parties recommend that the 2004 version of the Sentencing Guidelines Manual applies:

B. **Base Offense Level:** The parties recommend that Sentencing Guidelines §2D1.1 be used as the Chapter Two Offense Guideline. Under this Guideline's Drug Quantity Table, §2D1.1(c)(7), the parties recommend a base offense level of 26 based on the aggregate 5.26 grams of cocaine base crack for which Defendant is responsible under Counts One and Two.

C. **Specific Offense Characteristics:** The parties disagree whether Defendant qualifies for the "safety valve", Sentencing Guidelines §2D1.1(b)(7). The parties recommend that no other specific offense characteristics apply.

D. **Chapter Three Adjustments**

1. **Reckless Endangerment During Flight:** The parties disagree whether the adjustment for

reckless endangerment during flight, Sentencing Guidelines §3C1.2, applies to Defendant.

2. **Acceptance of Responsibility:** The parties recommend that Defendant receive a two-level downward adjustment for acceptance of responsibility under Sentencing Guidelines §3E1.1(a). The government's agreement to this recommendation is based on the information known as of the date of Defendant's guilty plea. If the government later learns of information that it believes is inconsistent with Defendant's acceptance of responsibility, it reserves the right to argue that Defendant should not receive this downward adjustment.

The parties disagree whether Defendant qualifies for an additional one-level downward adjustment under Sentencing Guidelines §3E1.1(b).

3. The parties recommend that no other Chapter Three adjustments apply.

E. **Criminal History:** The parties make no recommendation concerning Defendant's criminal history.

12/3/04 /s/ Christian M. Stevens
Date Christian M. Stevens
Assistant United States Attorney

12-03-04 /s/ Mario Claiborne
Date Mario Claiborne
Defendant

12/3/04 /s/ Michael Dwyer
Date Michael Dwyer
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
Plaintiff, v.	)	Case No. S1-4:04 CR 423 DJS
MARIO CLAIBORNE	)	
Defendant.	)	

DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT

(Filed Mar. 11, 2005)

Defendant Mario Claiborne, through his attorney, Assistant Federal Public Defender Michael Dwyer, objects as follows to the Presentence Investigation Report (PSR), which was prepared before the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), and consequently, treats the Guidelines as mandatory without regard to the statutory factors in 18 U.S.C. § 3553(a), which now govern sentencing.

I. Sentencing Principles Post-*Booker*

In *Booker*, the Court held that *Blakely v. Washington* applied to the federal sentencing guidelines, and that the Sixth Amendment's jury trial guarantee prevented judges from finding facts that exposed a defendant to increased prison time. *Booker*, 125 S.Ct. 738, 745. As a remedy, a different majority of the Court excised the provision of the Sentencing Reform Act that made the guidelines mandatory, 18 U.S.C. § 3553(b)(1). *Id.* at 764. This remedial majority held that district courts must still consider the

guideline range, 18 U.S.C. § 3553(a)(4) and (5), but must also consider the other statutory concerns in § 3553(a). *Id.* at 757-69 Thus, after *Booker*, the guidelines are just one of a number of sentencing factors.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." 18 U.S.C. § 3553. Section 3553(a)(2) states that such purposes are: (A) to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence, (C) to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See Id.* Section 3553(a) further directs sentencing courts to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available; (4) the sentencing range established by the guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. *See id.*

Thus, courts may no longer uncritically apply the guidelines. *See United States v. Ranum*, 353 F.Supp.2d 984, 985 (E.D.Wis. 2005). In every case, courts must now consider not just the Guidelines but *all* of the § 3553(a) factors, many of which the guidelines previously required

courts to reject or ignore.[1] In sum, "*Booker* is not as an invitation to do business as usual." *Id.* at 987. District courts must sentence the person before them as an individual.

A. Application to Mr. Claiborne's Case

1. ***Nature of the Offense.*** The offense conduct consists of Mr. Claiborne's distribution of less than a quarter gram of crack, .23 grams, on May 14, 2003 and possession of 5.03 grams of cocaine base on November 2, 2003. The seriousness of these offenses is mitigated by the relatively small drug quantity involved, which is just barely above the five-year mandatory minimum threshold quantity and far below the median for the majority of crack cocaine offenders.

Lower drug quantities correspond to lower culpability as defined by offender function. *See* United States Sentencing Commission, Report to the Congress, Cocaine and Federal Sentencing Policy, at p. 45 (May 2002).[2] Smaller scale street level dealers wield little decisionmaking authority and have limited responsibility. *Id.* at 99-100. The 2002 Report reflects the median drug quantity

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[1] For instance, under § 3553(a)(1), the court must consider a defendant's "history and characteristics", yet under the Guidelines, the court was generally forbidden to consider a defendant's age, U.S.S.G. § 5H1.1, his education and vocational skills, § 5H1.2, his mental and emotional condition, § 5H1.3, his physical condition including drug or alcohol dependence, § 5H1.4, his employment record, § 5H1.5, his family ties and responsibilities, § 5H1.6, his socio-economic status, § 5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, § 5H1.12.

[2] Available at www.ussc.gov (United States Sentencing Commission website).

involved for street-level crack dealers who make up the majority of crack cocaine offenders was 52 grams, ten times the amount that Claiborne has accepted responsibility for. *Id.* at 46.

2. *History and Character of the Defendant*

Mr. Claiborne's history and character weigh heavily in his favor. During his upbringing, Mario's parents separated when he was eight years old. He was unable to live with his father with whom he had a close relationship. He would visit him on weekends and during the summer. From kindergarten through eighth grade, he attended six different elementary schools. He failed third grade, finally dropping out of school in the ninth grade. At age 13, he began working in his father's business. He currently works full time, earning $7.67 an hour as a sorter at National Linen.

Now age 21, Claiborne has been in a stable relationship with the same woman, Ericka Fields, for 3 years. They have two children, Morieonn, age one, and Marieonna, age seven months. Ms. Fields has a three-year old child, Antonio, from a prior relationship, but Antonio's biological father neither maintains contact nor provides financial support. Claiborne has effectively shouldered and discharged this responsibility. He is the only father Antonio has known. Devoted to his family, Claiborne provides both financially and emotionally for Ms. Fields and all three children. She works full time at Family Value Center, earning $6.30 an hour. This close-knit family's stability depends on Defendant's continued presence, and his emotional and material support. His absence would have a profound impact on them. From a family and

employment standpoint, Mario has done all of the right things.

Claiborne has zero criminal history points (criminal history category (CHC) of I). Based on his history and his character, he is not a danger to society. The Sentencing Commission's research study on recidivism rates of Guideline offenders concluded that "offenders with zero criminal history points have lower recidivism rates than offenders with one or more criminal history points." *See* U.S.S.C., "Recidivism and the 'First Offender,'" 17 (May 2004).[3] "All offenders with zero criminal history points have a primary recidivism rate of 11.7 percent. This zero point recidivism rate is substantially lower than the recidivism rates for offenders with only one criminal history point (22.6%) or for offenders with two or more points (36.5%) combined in the CHC II through CHC VI column." *Id.*, at 13-14.

3. Needs of the Public

Claiborne's offense did not involve acts that have been associated with higher levels of culpability; such as, using or carrying a gun for self-protection, causing serious bodily injury to an individual, involving a juvenile or distributing drugs in proximity to a school. Therefore, a lengthy period of incarceration is not necessary to protect the public.

Attorney General Alberto Gonzales during his recent confirmation hearings asserted that prison is best suited "for people who commit violent crimes and are career criminals," and he also stressed that a focus on rehabilitation for "first-time, maybe sometimes second-time

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[3] Available at ussc.gov/publicat/Recidivism_FirstOffenderpdf.html

offenders . . . is not only smart, . . . it's the right thing to do." Transcript of the Senate Judiciary Committee's hearings on the nomination of Alberto R. Gonzales to be attorney general.[4]

4. Advisory Guidelines

As *Booker* directs, in determining Defendant's sentence, this court must consider the advisory Guidelines. Under section 2D1.1(a)(3), the base offense level for a total of 5.26 grams of cocaine base (crack) involved in the two counts is Level 26. *See* U.S.S.G. § 2D1.1(c)(7).

Offense level 26 seriously overstates the seriousness of the offense and Claiborne's lowlevel culpability. The Sentencing Commission has itself powerfully concluded that "*the Commission firmly and unanimously* believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 [Anti-Drug Abuse] Act." *See* United States Sentencing Commission, Report to the Congress, Cocaine and Federal Sentencing Policy at 91 (2002) (emphasis added).[5] The 1986 Act created the five and 10 year mandatory minimum penalties applicable to federal drug trafficking offenses. The Act also established the 100:1 drug quantity ratio between powder and crack cocaine, that the Commission concluded firmly and unanimously, "cannot be justified." *See* United States Sentencing Commission,

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[4] Available at: www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html

[5] Available at: ussc.gov/r_Congress/02Crack/2002crackrpt.html

Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997).[6]

The Commission responded to the Act by incorporating the statutory mandatory minimum sentences into the guidelines. It used the mandatory minimum quantities to calibrate the drug-quantity table, selecting offense levels 26 and 32 in which the bottom of the range was greater than the mandatory minimum.[7] Congress, in establishing the 5 and 10 year mandatory minimums, indicated that they were intended for first time offenders who are "serious" ("the managers of the retail traffic") and "major" drug traffickers ("manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities"). *Id.* at 99.

The legislative history indicates that

> The Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that

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[6] Available at: ussc.gov/r_Congress/NEWCRACK.pdf

[7] Offenses involving 5 grams or more of crack were assigned a base offense level 26 corresponding to a guideline range of 63 to 78 months for a first time offender in criminal history category I (a guideline that just exceeded the 5-year statutory minimum for such offenses). Similarly, offenses involving 50 grams of crack corresponded to an offense level 32.

> might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

H.R. Rep. No. 99-845, at 11-12 (1986).

Because Claiborne's role was not that of a leader or manager, but a small street-level retail trafficker, level 26 seriously overstates his offenses and his culpability. This factor is relevant to the statutory purposes of sentencing under section 3553(a). The *Booker* remedy enables this Court to give greater consideration to this overstatement in its assessment of the reasonableness of the proposed Guideline range, in conjunction with the nature and circumstances of the offense and characteristics of Claiborne.

5. Claiborne is safety valve eligible.

Sentencing Guidelines section 2D1.1(b)(6) instructs that for specified offenses, "[i]f the defendant meets the [safety valve] criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.1(a) . . . [the court shall] decrease by two levels" defendants' total offense level. The safety valve statute, 18 U.S.C. § 3553(f), provides that for various drug offenses, a district court "shall impose a sentence . . . without regard to any statutory minimum sentence" if the defendant meets five statutory criteria. 18 U.S.C. § 3553(f); *see also* §5C1.2 (incorporating statutory criteria).

The PSR establishes that Claiborne has satisfied the first four safety valve criteria: (1) he has no criminal history points; (2) he did not threaten to use, or use any, violence or possess any type of weapon; (3) the offense did not result in any injury, let alone serious bodily injury or death; and (4) he did not function as a supervisor,

manager, leader, or organizer of others in the offense. *See* § 3553(f)(1)-(f)(4) The fifth and final criteria provides that "not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all of the information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement" 18 U.S.C. § 3553(f)(5). The statute does not require that the defendant's truthful disclosure come in any specified form, place, or manner.

Claiborne's attorney has informed the government that Claiborne stands ready to satisfy the fifth criteria in any manner the government chooses. Believing that Claiborne does not qualify for the safety valve, the government chose not to meet with him. Assistant United States Attorney Christian Stevens, who represents the government in this case, said that Claiborne could submit a written statement through his attorney. Claiborne's attorney will do so separately by letter, but Claiborne remains open to any other means to demonstrate that he can satisfy the final safety valve criteria.

Upon satisfaction of all five criteria, Claiborne must be sentenced without regard to the otherwise applicable five-year mandatory minimum sentence, and he should receive an additional two-level reduction in the total offense level. *See* U.S.S.G. §5C1.2.

6. The enhancement for reckless endangerment during flight is not justified.

The PSR erroneously asserts that Claiborne "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. . . . " PSR at 4. Consequently, it erroneously adds two levels under the Chapter Three Adjustment for Reckless Endangerment During Flight. *See id.*; Sentencing Guidelines §3C1.2.

The information in the PSR falls far short of establishing, much less proving beyond a reasonable doubt, that Claiborne created any risk of death or serious bodily injury, let alone a substantial risk. Because this is an aggravating adjustment under Chapter Three, the government bears the burden of proof on this issue, and Claiborne believes that the applicable standard of proof is the beyond-a-reasonable-doubt standard.

After police saw Claiborne on the front porch at 3455 Oregon, he fled on foot, running north on Oregon. A short distance away, at 3429 Oregon, the front door to the residence was open. Claiborne ran into the open door, through the house, and out the rear door. There is no evidence that he touched anyone as he ran into or through the house. Nothing in the PSR suggests that Claiborne threatened or assaulted anyone in the process of entering or leaving 3429 Oregon. Although the PSR asserts that 3429 Oregon "was occupied by Mary Clemons, and several of her grandchildren,[8] Claiborne believes that this assertion is incorrect. Clemons and three of the children (not grandchildren) were outside, in the front of the residence,

[8] PSR at 2.

as Claiborne entered and departed. Clemons's children's ages are 18, 15, 12, and 11. Claiborne was in the house only for the length of time it takes to run from the front door to the back door. No weapons were displayed or discharged during the pursuit, and the government has never suggested that Claiborne was armed.

Under any standard of proof, these facts fail to establish the "substantial risk of death or serious bodily injury to another person" that section 3C1.2 explicitly requires. *See* Sentencing Guidelines §3C1.2. After *Booker*, however, Claiborne believes that the government bears the burden of establishing a section 3C1.2 adjustment beyond a reasonable doubt. In his separate opinion, Justice Thomas observed:

> The commentary to [Sentencing Guidelines] § 6A1.3 states that "[t]he [Sentencing] Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

Booker, 125 S. Ct. at 798 n.6 (Thomas, J., dissenting in part). Similarly, Judge Bataillion in Nebraska concluded that post-*Booker*,

> [t]he Due Process Clause is implicated whenever a judge determines a fact by a standard lower

> than "beyond a reasonable doubt" if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact. *Id.* at 754-55; *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348. *Booker* does not alter these due process constraints on sentencing. *See Blakely*, 124 S.Ct. at 2539-40."

United States v. Huerta-Rodriguez, 2005 WL 318640 (D. Neb. Feb. 1. 2005) (footnote omitted). A finding of reckless endangerment under Sentencing Guidelines section 3C1.2 is such a fact and, therefore, the government's burden in Claiborne's case requires proof beyond a reasonable doubt.

That the facts found in the PSR fall far short of proving reckless endangerment is evident when one looks at case law concerning section 3C1.2. Unlike Claiborne's extremely brief transit from the front to the back of the Clemons residence, the more typical case involves dramatically more egregious conduct. In *United States v. Cook*, 356 F.3d 913, 917 (8th Cir. 2004), for example, the defendant drove through a residential area while intoxicated, crossed an intersection through oncoming cross-traffic, abandoned his car, charged into a stranger's home to hide, and required police to enter the house at gunpoint and arrest him in the presence of a mother and her seven children. *See* 913 F.3d at 917. As in *Cook*, reckless endangerment typically involves police pursuit of a defendant fleeing at high speed in a motor vehicle. *See United States v. Moore*, 242 F.3d 1080, 1081 (8th Cir. 2001) (defendant fled police, drove 80 to 100 mph, ran two red lights, and swerved in and out of traffic on a busy highway); *United States v. Valdez*, 146 F.3d 547, 553-54 (8th Cir. 1998) (defendant fled by driving 70 to 80 mph on gravel road for over four miles with three state troopers in pursuit, waved

shotgun during chase, and police fired at fleeing truck); *United States v. Sykes*, 4 F.3d 697, 700 (8th Cir. 1993) (police had to force defendant's speeding vehicle off road to apprehend him); *United States v. Pierce*, 388 F.3d 1136 (8th Cir. 2004) (defendant rammed police vehicle with his truck multiple times and then collided with parked cars); *see also United States v. Goolsby*, 209 F.3d 1079, 1081 (8th Cir. 2000) (defendant pushed minor child, who was in his care, into path of oncoming police vehicle as he fled officers attempting to execute search warrant). Other cases involve a loaded guns pointed at police officers. *See United States v. Rice*, 184 F.3d 740, 742 (8th Cir. 1999) (defendant pointed loaded gun at uniformed officers executing a search warrant); *United States v. Santiago RivasGomez*, 2002 WL 21942 (8th Cir. 2002) (unpublished) (defendant aimed his gun at a pursuing officer and pulled the trigger).

Claiborne's conduct contrasts sharply with these cases. His unarmed flight threatened no one. He was on foot, not in a vehicle. He exited 3429 Oregon immediately after entering. In these circumstances, the reasoning of *United States v. Reyes-Oseguera*, 106 F.3d 1481 (9th Cir. 1997) should apply. The court "reiterate[d] the rule that instinctive flight on foot from law enforcement *is insufficient on its own* to justify the application of section 3C1.2. The guidelines contemplate that some additional conduct must create a substantial risk." *Id.* at 1483 (emphasis added). The court then applied this rule in reviewing the district court's conclusion that ReyesOseguera should receive the reckless endangerment adjustment because "(1) Reyes-Oseguera fled law enforcement officers on foot; and (2) an armed law enforcement officer pursued, tackled, and subdued Reyes-Oseguera." *Id.* at 1484. It concluded

that the government had failed to prove reckless endangerment:

> Reyes-Oseguera's instinctive flight alone will not support the enhancement, nor will the armed agent's pursuit. Most flight will draw pursuit, and most law enforcement officers are armed. To hold that a defendant recklessly endangers another solely because he is pursued by an armed agent is the functional equivalent of finding instinctive flight sufficient. We are also wary of attributing an awareness of the actions of law enforcement officials to suspects who are in the midst of instinctive – and therefore not reasoned or contemplative – flight.

Id. Like Reyes-Oseguera, Claiborne did not "recklessly create[] a substantial risk of death or serious bodily injury to another person." Sentencing Guidelines §3C.1.2.

7. The Applicable Guidelines

The PSR has calculated a guideline range of 60 to 71 months which does not reflect Mr. Claiborne's eligibility for the safety valve. PSR, at 7. After a 2-level safety valve reduction, and a 3-level reduction for acceptance of responsibility, the advisory Guideline range is properly computed at 37 to 46 months, based on a total offense level of 21 and Criminal History Category I. This range, however, reflects the serious overstatement of the offense resulting from the 100:1 crack/powder ratio discussed above. Had Claiborne possessed only powder cocaine, his offense level would have dropped to level 12 and after a 2-level reduction for acceptance of responsibility, resulted in a guideline range of 6 to 12 months. Taking into account all of the information in these objections, Claiborne

believes that the 37 to 46 month range is unreasonable under the circumstances and requests a lower sentence to reflect the true seriousness of his crime and the nature and circumstances of his life experience.

Dated March 11, 2005.

Respectfully submitted,

/s/ Michael Dwyer
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**No. S1-4:04CR423 DJS**
MARIO CLAIBORNE,	)	
Defendant.	)	

GOVERNMENT'S SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT

(Filed Mar. 25, 2005)

COMES NOW the United States of America, by and through its attorneys, James G. Martin, United States Attorney for the Eastern District of Missouri, and Cristian M. Stevens, Assistant United States Attorney for said District, and for its sentencing memorandum and response to defendant's objections to the presentence report states as follows:

I. INTRODUCTION

According to the presentence investigation report ("PSR") of the United States Probation Office, defendant's sentencing range is 60 to 71 months in prison. This range results from, among other things, a two-level upward adjustment pursuant to Sentencing Guidelines § 3C1.2 for reckless endangerment during flight, and defendant's failure to qualify for the so-called "safety valve" pursuant to Sentencing Guidelines § 5C1.2(a) and 18 U.S.C.

§ 3553(f). The Government hereby files its sentencing memorandum in support of the PSR and respectfully requests that the Court impose a sentence within the recommended sentencing range.

Defendant Mario Claiborne ("defendant") objects to the PSR on the bases that: the PSR treats the Sentencing Guidelines as mandatory, despite that the Supreme Court's decision in *United States v. Booker,* 125 S.Ct. 738 (2005), renders the guidelines advisory; defendant qualifies for the safety valve; and the two-level upward adjustment for reckless endangerment during flight must be proved beyond a reasonable doubt.

Defendant's objections should be denied. First, defendant's argument that the advisory Sentencing Guidelines and defendant's "history and character" weigh in favor of a sentence below the guideline range of 60 to 71 months is incorrect both legally and factually. Although the Sentencing Guidelines were rendered advisory in *Booker,* the bottom of defendant's sentencing range is the *statutory* mandatory minimum of 60 months found in 21 U.S.C. § 841(a). Furthermore, for all defendant's talk of his lack of recidivism, this case involves two counts for *two separate arrests* on May 14, 2003, and November 2, 2003, both involving cocaine base.

Second, defendant does not qualify for the safety valve. Defendant misrepresents that the Government "chose not to meet with" defendant for a safety valve proffer in an attempt to explain defendant's failure comply with that requirement to date. In any event, defendant does not meet the safety valve criterion that he "did not use violence or credible threats of violence" in connection with the offense to which he pleaded guilty. As defendant

concedes in his objection, defendant fled through the home of a grandmother and her grandchildren with armed police officers in hot pursuit.

Finally, for much the same reason, the two-level adjustment pursuant to Sentencing Guidelines § 3C1.2 applies for reckless endangerment during flight. Whether or not defendant's flight into Mary Clemons' home amounts to a "threat of violence" for the purpose of the safety valve, it certainly "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2.

For all of these reasons, defendant's objection should be denied and defendant should be sentenced within the sentencing range set forth in the PSR.

II. ARGUMENT

A. Defendant Should be Sentenced Within the Sentencing Range.

Defendant's first argument states the obvious: the Supreme Court rendered the Sentencing Guidelines advisory in *United States v. Booker,* 125 S.Ct. 738 (2005). That the Sentencing Guidelines are advisory is a moot point in this case, however, because the bottom of defendant's sentencing range is the *statutory* mandatory minimum of 60 months found in 21 U.S.C. § 841(a). PSR ¶ 48. The quantity of cocaine base subjecting defendant to the mandatory minimum under § 841(a) was found by the grand jury in the indictment and conceded by defendant in the stipulation of facts to which he pleaded guilty.

Still, defendant argues that his "history and character" weigh in favor of a sentence below the guideline range. Defendant waxes poetic for several pages about his devotion to, and financial support of, his family, and even asserts that he "has done all the right things." Then, defendant argues that, based on his lack of criminal history and his sterling character, he is not a danger to society. For all the discussion of recidivism rates, defendant fails to mention that this Court need look no further than the offenses to which defendant pleaded guilty to grasp defendant's propensity for recidivism. Defendant sold cocaine base on May 14, 2003, and possessed more than five grams of cocaine base only six months later, on November 2, 2003. Defendant's self-description as a "small street level retail trafficker" makes clear the means by which he has provided the asserted financial support of his family. Thus, even were the bottom of the sentencing range in this case discretionary, the proper sentence still would be within the prescribed range of 60 to 71 months.

B. Defendant Does Not Qualify for the Safety Valve.

Defendant does not qualify for the safety valve. To qualify for the safety valve, a defendant must meet the following conditions:

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;

> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . ; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or a common scheme or plan. . . . 18 U.S.C. § 3553(f) (1)-(5); U.S.S.G. § 5C1.2(a)(1)-(5).

Defendant misrepresents that the Government "chose not to meet with" defendant for a safety valve proffer, pursuant to § 3553(f)(5) and § 5C1.2(a)(5). The truth of the matter is that defense counsel recently called the undersigned regarding a safety valve proffer. The undersigned indicated that defendant did not meet the criteria for the safety valve, but that in the event that the Court determined otherwise, the Government was willing to conduct a safety valve proffer before the sentencing hearing. Defense counsel then offered to submit the proffer in writing, and the undersigned agreed to accept a written proffer. To date, defense counsel has not submitted a written proffer of information, nor produced defendant for a proffer discussion. Defendant bears the burden of proof regarding this safety valve requirement. *United States v. Surratt,* 172 F.3d 559, 566 (8th Cir. 1999).

In any event, defendant otherwise has failed to meet the safety valve criteria. That is, defendant cannot fulfill the criterion that he "did not use violence or credible threats of violence" in connection with the offense. *See* 18 U.S.C. § 3553(f)(2); U.S.S.G. § 5C1.2(a)(2). As defendant concedes in his objection, defendant fled into the home of a grandmother and her grandchildren, who did not know defendant, with armed police officers in hot pursuit. Such conduct involved a "threat of violence," as that phrase

properly is understood. *See American Heritage Dictionary* 1801 (4th ed. 2000) (defining "threat" as "an indication of impending danger or harm."); *Webster's New World Dictionary* (3d ed. 1988) (defining "threat" as "an indication of imminent danger, harm, evil, etc.").

C. The Adjustment for Reckless Endangerment During Flight Applies.

Due to the same, apparently uncontested conduct of defendant, the two-level enhancement pursuant to Sentencing Guidelines § 3C1.2 applies for reckless endangerment during flight. Whether or not defendant's flight through the home of Mary Clemons, to whom defendant was a stranger, amounts to a "threat of violence" for the purpose of the safety valve, it "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2.

A person is "reckless" under the Sentencing Guidelines when he "was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation." U.S.S.G. § 2A1.4 Commentary n.1; *see also United States v. Luna,* 21 F.3d 874, 885 (9th Cir. 1994) (citing U.S.S.G. § 2A1.4 definition of "reckless" and affirming district court's application of reckless endangerment adjustment because defendant abandoned a running car in a residential area and fled on foot); *United States v. Blake,* No. 93-3421, 1994 WL 318950, at **2 (7th Cir. June 28, 1994) (unpublished) (citing U.S.S.G. § 2A1.4 definition of "reckless" and affirming district court's application of

reckless endangerment adjustment because defendant jumped on moving cars while fleeing from police on foot). Based on the above definition, and supporting cases, defendant's conduct in fleeing into Mary Clemons' home constituted "a gross deviation" from ordinary care.

In turn, defendant's gross deviation from ordinary care "created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." *See, e.g., United States v. Hampton,* 100 Fed. Appx. 792 (10th Cir. 2004) (holding district court did not err in applying reckless endangerment adjustment because armed defendant fled on bicycle and on foot and attempted to enter home of stranger); *United States v. Winston,* 97 Fed. Appx. 785 (9th Cir. 2004) (holding district court permissibly applied reckless endangerment adjustment because armed defendant fled on foot into stranger's apartment).

Finally, defendant's reliance on a dissenting opinion in *Booker* for his argument that the Government must prove reckless endangerment beyond a reasonable doubt is misplaced. The *Booker* majority rendered the Sentencing Guidelines advisory precisely to avoid placing Fifth and Sixth Amendment constraints on guideline sentences. See *Booker,* 125 S.Ct. at 764 (2005) (explaining that excision of 18 U.S.C. § 3553(b)(1), which makes the Sentencing Guidelines mandatory and imposes binding requirements on all sentencing judges, removes the sentencing statute from *Apprendi*'s purview). In any event, defendant's conduct implicating the upward adjustment for reckless endangerment is set forth in the PSR and conceded in defendant's objections.

For all of these reasons, the PSR correctly recommends a two-level upward adjustment for reckless endangerment during flight pursuant to Sentencing Guidelines § 3C1.2.

III. CONCLUSION

WHEREFORE, the Government respectfully requests that this Court deny defendant's objections to the presentence report, and sentence defendant within the sentencing range set forth in the PSR.

Respectfully submitted,

JAMES G. MARTIN
United States Attorney

s/ *Cristian M Stevens*
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UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
MISSOURI EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff, v.	)	Case No. S1-4:04 CR 423
MARIO CLAIBORNE, CEJ	)	
Defendant.	)	

DEFENDANT CLAIBORNE'S REPLY TO THE GOVERNMENT'S SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT

(Filed Mar. 27, 2005)

Defendant Mario Claiborne, through his attorney, Assistant Federal Public Defender Michael Dwyer, replies as follows to the Government's Sentencing Memorandum and Response to Defendant's Objections to the Presentence Report (Government's Response).

1. The government incorrectly asserts that Defendant and Mary Clemons did not know each other. Clemons knew Claiborne from the neighborhood, and "they would acknowledge each other when passing by." Exhibit A (attached) (summary of September 14, 2004 interview of Clemons). She acknowledged telling the police on November 2, 2003, that she did not know Claiborne, but explained that the incident happened so quickly she didn't recognize Claiborne. *See id.* While not personal friends, Claiborne and Clemons were not strangers. *See id.* Consequently the government errs in asserting that they did not know each other or were strangers to each other. *See* Government's Response at 5.

2. The government cites four cases in support of its argument that Claiborne recklessly endangered others. *See* Government's Response at 56. These cases, however, are factually distinguishable and these differences support Claiborne's argument that his conduct did not "create[] a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. . . ." Sentencing Guidelines §3C1.2. The conduct involved in these case was, in contrast to Claiborne's, both violent and reckless.

A. The government cites to *United States v. Luna,* 21 F.3d 874, 885 (9th Cir. 1994). *See* Government's Response at 5. In *Luna,* the defendants, unlike Claiborne, were fleeing from an armed bank robbery during which patrons and tellers were verbally abused and ordered to lie on the floor. *See* 21 F.3d. at 876. The robbers also struck the bank manager in the face as they fled. *See id.* Fleeing in an automobile, they ran stop signs while being pursued by the police. *See id.* When the robbers abandoned the car, by jumping out, it was still moving, rolling over a curb, and coming to rest under a tree. *See id.* At one point during the flight, a police officer approached the car on foot. One of the robbers reached toward the car's floorboard, where police later found a firearm. *See id.* These facts are considerably more reckless and violent than suggested by the government's summary statement that in *Luna* a "defendant abandoned a running car in a residential area and fled on foot." Government's Response at 5-6.

B. In *United States v. Blake,* 1994 WL 318950 (7th Cir. June 28, 1994) (unpublished), the defendant did far more than merely run through an acquaintance's house:

Blake and the government entered into a factual stipulation pursuant to the plea agreement. The stipulation details that on May 18, 1993 Deputy United States Marshal Nicholas Mann went to the residence of the defendant's mother with an outstanding warrant for Blake's arrest. Upon arrival, Deputy Marshal Mann observed Blake fleeing, and yelled, "Stop! Police!" Blake continued to flee and Mann followed him, continually yelling for him to stop and identifying himself as a Deputy U.S. Marshal.

The foot pursuit continued onto Route 3 where it met with oncoming traffic. When Blake jumped onto the trunk of a moving car and fell off, Mann was able to overtake him and attempted to handcuff him. Blake forcibly pushed Mann off and away, ran back into traffic, jumped on the hood of a car and ordered the driver to drive. The driver refused. Mann then forcibly pulled Blake from the car and ordered him to lay down on the ground, a command repeated throughout the ensuing struggle. Blake charged, forcibly knocking Mann to the ground. Mann got up and attempted to restrain him. Blake continued to resist Mann by pushing him in the chest, neck, and shoulder areas. Blake forced Mann off and fled again.

The pursuit continued north to Adams Street, where Mann was able to overtake Blake and attempt to secure him against the trunk of a taxi cab. When the cab driver exited his car, however, Blake jumped into the driver's seat and attempted to put the running vehicle into gear. There were several children standing in front of the taxi. At this point, Mann drew his weapon and ordered Blake to stop. Mann then handcuffed one of Blake's wrists, though the Blake

> continued to fight. Finally, Mann secured both of Blake's hands behind his back and handcuffed him to the steering wheel of the taxi.

Id. at **1. Again, these facts demonstrate far more reckless, violent behavior than the government's summary ("defendant jumped on moving cars will fleeing from the police on foot") suggests. Government's Response at 6.

C. Similarly, in *United States v. Hampton*, 2004 WL 1249787 (10th Cir. June 8, 2004) (unpublished), the defendant's conduct was far more reckless and violent than the government's summary suggests ("armed defendant fled on bicycle and foot and attempted to enter home of stranger"). Government's Response at 6. In *Hampton,* the defendant fled from a shooting and tried to force his way into a stranger's home at gunpoint. *See Hampton,* 2004 WL 1249787 at **1.

> On the night of September 27, 2002, Tulsa police officers heard gun shots and shortly thereafter saw the defendant riding away from the vicinity on a bicycle. The officers ordered the defendant to stop, but the defendant ignored them. The officers pursued the defendant who rode into an apartment complex. After crashing on his bicycle, the defendant fled on foot.
>
> A twenty-one-year-old resident of one of the apartments testified at a grand jury hearing that as he was about to leave his apartment, he saw spot lights coming from police cars and heard someone running. The resident got scared and tried to shut his apartment door, but the defendant, who had run up to the door, started pushing against the door apparently in order to enter the apartment. The resident told his

> mother and three younger siblings to go upstairs. After struggling for about two minutes against the defendant's efforts to enter the apartment, the resident got tired and let the door open halfway. The resident testified that the defendant then stuck his arm into the apartment and handed the resident a loaded gun. Then, the defendant threw a few empty bullet shells on the apartment floor and tried to flee. He was immediately apprehended by police officers. The police officers testified that they saw the defendant remove the gun from his waistband while he was pushing against the door.

Id.

D. In the fourth case that the government relies on, *United States v. Winston,* 2004 WL 1197412 (9th Cir. May 20, 2004) (unpublished), the court does not provide the facts of the case. *See id.* at **1. This unpublished memorandum remanded the case to the District court on grounds other than the reckless endangerment issue. However, it was apparently agreed that the defendant, unlike Claiborne, was armed during his flight. *See id.*

3. As to the safety valve, a defendant must show that he or she has "not later than the time of the sentencing hearing, . . . provided to the Government all information and evidence the defendant has concerning the offense. . . ." Sentencing Guidelines §5C1.2(5). Defendant believes he has satisfied this requirement by means of the letter to Assistant United States Attorney Cristian M. Stevens, who represents the government in this case. A copy of the letter is attached to this Reply as Exhibit C, and a signed copy will be hand-delivered to the government before the sentencing hearing.

WHEREFORE, for the reasons stated in this Reply and in Defendant's Objections to the Presentence Investigation Report, he requests that the Court find that (1) the safety valve applies in his case and (2) that he did not reckless endanger others within the meaning of Sentencing Guidelines §3C1.2.

Dated March 27, 2005.

Respectfully submitted,

/s/ Michael Dwyer
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Attorney for Defendant Claiborne

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Exhibit A

Office of the Public Defender
Eastern District of Missouri

MEMORANDUM

TO: Michael

FROM: Ernie

DATE: September 14, 2004

RE: U.S. v. Mario Claiborne – Phone Interview with Witness Mary Clemons

****

On today's date at 8:45 a.m. I called Mrs. Clemons at 314-773-2450 in response to a voice mail message she had left on my office voice mail.

There was a previous attempt on September 13, 2004 to interview Mrs. Clemons at her residence at 3429 Oregon, St. Louis, Missouri 63118; she was not home, and I left business cards on the residence door.

When calling her this morning I was advised to call her at 314-771-6247 and she stated the following:

On the date of the incident she was seated on her front steps to 3429 Oregon with her children and grandchildren. Mrs. Clemons said that there were many other residents including children outside. Mrs. Clemons also had her front door wide open. Mrs. Clemons heard one gunshot that caused excitement and residents in the street running into their homes for safety. She then saw the defendant run into her house through the front door before she and the children were able to, and she then entered her home; a few seconds later the police arrived who asked

her if the defendant entered her home and she told them that he had; Mrs. Clemons then asked the police to remove the defendant from her house, but Mrs. Clemons' daughter (Shadonna Clemons) who was cooking in the kitchen near the back door said that the defendant went out the back door.

Mrs. Clemons had told the police that she did not give permission to the defendant to enter her home. Mrs. Clemons did tell the police that she did not know the defendant (she explained to me that she didn't recognize the defendant during the incident because it happened so quickly). Mrs. Clemons does not personally know the defendant, but she has seen him in the neighborhood and they would acknowledge each other when passing by.

Exhibit B

Office of the Public Defender
Eastern District of Missouri

MEMORANDUM

TO: Michael

FROM: Ernie

DATE: September 28, 2004

RE: U.S. v. Claiborne – Phone Interview – Witness Mary Clemons

****

Today at 10:20 a.m., I contacted Mrs. Clemons by phone at 314-773-2450. I have contacted and interviewed this witness in the past.

Mrs. Clemons said that her daughter Shadonna Clemons (18 years old) was in the house in the kitchen cooking. Mrs. Clemons' other children who were outside with her during the incident are Keisha (15 years old), Kadeem (12 years old), Leon (11 years old). I asked Mrs. Clemons who Danielle is and she said that she was someone who stayed at her home, but is not related.

I asked Mrs. Clemons about interviewing her children and she said since they are in school and involved in extracurricular activities that she will need to contact me when I can interview them.

Mrs. Clemons also said that the defendant, who was running, entered her home before she was able to gather her children to get them inside for safety. Mrs. Clemons said that the only person in her home was her daughter Shadonna who was in the kitchen cooking. After the defendant ran into her home Mrs. Clemons and her children then entered and shortly thereafter the police arrived.

Exhibit C

FEDERAL PUBLIC DEFENDER
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Suite 200
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NORMAN S. LONDON
FEDERAL PUBLIC DEFENDER

MICHAEL DWYER
ASSISTANT FEDERAL PUBLIC DEFENDER

March 27, 2005

Mr. Cristian M. Stevens
Assistant United States Attorney
111 S. 10th Street, Room 20.333
St. Louis, Missouri 63102

SUBJECT: United States v. Mario Claiborne, Case No. S1-4:04 CR 423 CEJ

Dear Mr. Stevens:

I am writing to follow-up on our previous telephone conversation concerning the applicability of Sentencing Guidelines §5C1.2 and §2D1.1(b)(7), the safety valve, to Mario Claiborne.

I understood that you believed that these sections were inapplicable in Claiborne's case because: (1) you believed he recklessly endangered others during the course of the offense and (2) you believed that this conduct constituted the use of violence or the threat of violence. On the basis of these beliefs (with which we disagree), you concluded that Claiborne was ineligible for the safety valve and did not wish to meet with Claiborne for the purpose of his satisfying the requirement in section

5C1.2(5) to provide the government with all his information and evidence concerning the offenses to which he pled guilty. You also said, however, that should the Court rule that Claiborne used or threatened violence, you would be willing to meet with Claiborne. Because we would not have a ruling from the Court on the question of violence before the sentencing hearing, I also suggested that I would provide you with information in writing in an attempt to satisfy section 5C1.2(5). This letter contains that information.

As to the May 14, 2003 incident, we do not disagree with any of the information in paragraphs 8 and 9 on page 2 of the Presentence Investigation Report. In addition to this information, Claiborne would tell you that he sold crack in the area of 37th and Itaska in the City of St. Louis for approximately two and a half months between either the end of February, 2003, or early March, 2003, until his May 14, 2003 arrest. He was there from about 9:00 p.m. to midnight or 1:00 a.m., almost every day. Often he was unable to sell anything because there were a large number of individuals selling in that area. Claiborne estimates that he was one of approximately 15 to 20 other crack sellers. Further, Claiborne was not from that neighborhood, and the other dealers resented his intrusion into their territory. He obtained his crack from a man named Shawn, whose last name he does not know. Claiborne would call Shawn, who would deliver the crack to him. He could obtain five or six rocks from Shawn for $50.00. He would try to sell each rock for $20.00.

As to the November 2, 2003 incident, there is less to tell. Claiborne came to 3455 Oregon that day to see a

friend, Black, who lived at that address. Black was not at home. A young man, Dewayne (Claiborne does not know his last name) was on the front porch of 3455 Oregon. Claiborne had not planned to meet with Dewayne, they encountered each other by happenstance. He had not previously dealt with Dewayne, although they knew each other as acquaintances. Dewayne offered to sell Claiborne the crack that was later seized. Claiborne took the bag of crack from him and had it in hand examining it when the police pulled up in front of 3455 Oregon.

I hope you believe, as I do, that this information satisfies Claiborne's obligation under section 5C1.2(5) to provide "not later than the time of the sentencing hearing . . . all information and evidence the defendant has. . . ."

Sincerely,

Michael Dwyer
Assistant Federal
Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
Plaintiff,	) Case No.
vs.	) 4:04-CR-423-DJS
MARIO CLAIBORNE,	) (Filed Apr. 21, 2005)
Defendant.	)

BEFORE THE HONORABLE CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
SENTENCING HEARING
MARCH 28, 2005

FOR THE PLAINTIFF:	CRISTIAN M. STEVENS, ESQ. OFFICE OF THE U.S. ATTORNEY 110 S. 10TH STREET, 20TH FLOOR ST. LOUIS, MISSOURI 63102 314.539.2200
FOR THE DEFENDANT:	MICHAEL DWYER, ESQ. FEDERAL PUBLIC DEFENDER'S OFFICE 1010 MARKET STREET, SUITE 200 ST. LOUIS, MISSOURI 63102 314.241.1255
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[2] ST. LOUIS, MISSOURI, MARCH 28, 2005

10:00 a.m.

THE COURT: Good morning.

MR. STEVENS: Good morning.

THE COURT: This is United States v. Mario Claiborne. There were some objections to the Presentence Report, which I think we probably need to talk about first. And I have the government's response as well as the defendant's sentencing memorandum. I should also mention that this morning a letter that was addressed to Judge Stohr was forwarded to me. It is a letter written from a Ms. Reed, I believe – Arlene Reed. And she wrote in support of Mr. Claiborne. I don't know if you brought this over Mr. Dwyer, but I did have a chance to read this this morning.

MR. DWYER: Thank you, Your Honor, I did. When the court referred to our sentencing memorandum, was it referring to the reply to the government's response that we filed?

THE COURT: Yes. It was in reply to the government's response.

MR. DWYER: Thank you, Your Honor.

THE COURT: I guess it was the government who filed the sentencing memorandum, and you filed a reply to that okay. Yes, this is the one that you filed yesterday.

MR. DWYER: Thank you, Your Honor.

THE COURT: All right. As I understand it, there [3] are basically two objections that have any real

substance, one of which has to do with whether Mr. Claiborne qualifies for the safety valve. And the second is, you know, if he does, then I guess the second issue is whether his offense level should be recalculated.

And it's not entirely clear to me what the government's position is on one of the elements regarding the safety valve, and that has to do with whether the defendant has made an effort to provide information. And I am not sure what the government's position is on this.

MR. STEVENS: Well, judge, honestly, I don't think that's any longer an issue. Attached to Mr. Dwyer's reply of yesterday was a letter –

THE COURT: Right.

MR. STEVENS: – that the government has no problem accepting.

THE COURT: Okay.

MR. STEVENS: And I think it fits that requirement.

THE COURT: Okay.

MR. STEVENS: So that shouldn't be an issue today.

THE COURT: Okay. But this is still an issue of whether the there was violence or a threat of violence used by Mr. Claiborne, and that has to do with the circumstances that preceded his arrest; that is, his running through the home of a Mrs. Clemens (phonetic); and whether that [4] disqualifies him for the safety valve.

MR. DWYER: Yes, Your Honor.

THE COURT: Why don't you say what you have to say about that, Mr. Dwyer?

MR. DWYER: Well, Your Honor, I don't have much more to say than we offered in the two pleadings that we filed. I think it's clear that after he was spotted by the police and fled from them, he ran up the street a short distance. Mrs. Clements' door through her house was open. He ran past her. She was outside. He ran through the house; immediately exited the house through the rear door.

We know that, because Mrs. Clements' 18-year-old daughter was in the kitchen as Mr. Claiborne ran through the house. So the question is is his running down the street and running through an open door of Mrs. Clemens' house and immediately out the back door, does that qualify him for reckless endangerment during flight. And we've indicated with the case law that we cited in the objections and frankly we think that the case law that the government cited establishes this that when courts have said that a person recklessly endangered others in flight, the conduct was significantly more egregious than the conduct we have at issue in this case.

And I think it is important to make the distinction that we were not suggesting in any way that this was good [5] conduct or approved conduct. What I am saying is that the government, on the basis of what I understand the facts to be, has not proved that he used violence or threatened violence; a substantial risk of violence or threat of violence to others. And for that reason, I do not believe that the adjustment found in section 3(c)(1.2) – the reckless endangerment adjustment – applies to Mr. Claiborne's conduct.

THE COURT: The conduct, as I understand it, really the facts relating to the conduct really aren't in dispute. This was a situation where Mr. Claiborne was being chased by the police. He saw an opportunity which was essentially an open door to someone's home. Whether he knew the person or is not relevant, in my view. He wasn't invited in.

MR. DWYER: That's correct.

THE COURT: He ran through this lady's house and out through the back door, because the police were chasing him.

MR. DWYER: That's correct, Your Honor.

THE COURT: Okay. And the owner of the house was in her front yard at the time with some children, but there was an older daughter – an 18-year-old – who was inside the house in the kitchen –

MR. DWYER: Yes, Your Honor.

THE COURT: – at the time Mr. Claiborne ran through.

[6] MR. DWYER: Yes. That's correct, Your Honor.

THE COURT: He didn't have a gun. Or if he did, he didn't display one.

MR. DWYER: He did not have a gun, Your Honor. And there is no suggestion that I've seen anywhere that anybody thought he was armed.

THE COURT: He made no oral threats to anyone in the house? Okay. And he didn't hurt anybody

physically. He had no physical contact with anyone in the house.

MR. STEVENS: That's correct. That's correct, judge.

THE COURT: Okay.

MR. STEVENS: Judge, if I may, I would just point out in the memorandum filed as Exhibit A with the defendant's reply to the government's response, it does indicate – and I don't know that this is the case or not – Mrs. Clemens told me something: Similar that she heard a gunshot that caused excitement; and that they were attempting to get back in the house when the defendant ran through the door; that her daughter was inside; that he ran immediately past them as they were trying to get in the door of the house –

I don't dispute that the defendant did not make physical contact with anyone and didn't physically assault anyone, but I think that that may be an important fact. Also, judge, I have here – and I've given it to Mr. Dwyer [7] this morning – basically, I didn't intend to mark this. But with the memorandum that was attached to the defendant's reply, I think it might be at least worthwhile to point out to the court that Miss Clemens did appear at the grand jury, and I have provided this to Mr. Dwyer and indicated that this concerned her when he ran into her house, because she didn't know if he had a gun or if they would starting or whatever. "You know, one of me or my kids could have got shot." That what she said. Now, obviously, as you said, the defendant didn't display a gun at any time that I'm aware of, but that was Miss Clement's concern; whether that impacts the court's decision or not is obviously up to the Court. I am willing to submit that

grand jury testimony as a marked exhibit if you'd like, judge. But I would otherwise just proffer that portion of the grand jury testimony.

THE COURT: I'll accept your proffer on that. Thank you. Do you want to respond on the issue of whether this conduct qualifies Mr. Claiborne for this two level-increase in his offense level for, I guess, reckless endangerment if nothing else?

MR. STEVENS: Yes, judge, I would. I think honestly, judge, that that's a much stronger argument for the government. For Mr. Claiborne to not receive the safety valve, the Court would have to find he used violence or credible threats of violence or possessed a firearm.

[8] Now, there is no issue about him possessing a firearm, so far as the government is concerned. The issue is the use of violence or credible threats of violence, and that's a difficult standard to meet, I admit, under the circumstances of this case. But the reckless endangerment during flight is a much different standard. That would be that the defendant "recklessly created a substantial risk of the death or serious bodily injury to another person in the course of fleeing from a law enforcement officer."

I think that the undisputed facts here are, Your Honor, that this defendant ran past Miss Clemens and her grandchildren in front of the house; beat them inside the house to the front door; ran into the house; and that Miss Clemens' daughter was inside the house. The police officers were in hot pursuit of Mr. Claiborne, believing that he committed a felony, which he's pleaded guilty to, and followed him into that house.

Obviously, there is no dispute, I would think, that the police officers were armed. So Mr. Claiborne, in his flight from the police, by going into Miss Clemens' house, brought these armed police officers in hot pursuit in behind him. And I think that those circumstances really don't make this all that close of a case regarding reckless creating a substantial risk of at least serious bodily injury to someone in that house.

[9] THE COURT: Is there anything else on this?

MR. DWYER: Your Honor, I think that the facts show that he was in the house only momentarily. As the court indicated, we don't contest that he wasn't invited into the house. But the police learned immediately from Mrs. Clemens Mary Clements' daughter that Mr. Claiborne had exited the house through the back door immediately. And the police had time to talk to Miss Clemens out front, and it was she who invited the police or asked the police to go in the house.

So, you know, there are some timing suggestions here that I think belie this that there are police officers that are storming the house with loaded weapons drawn and ready to shoot at the defendant or anybody else in there. I don't think it is quite so dramatic. I think that the police pulled up out front; talked to Miss Clemens; and then went into the house at her invitation; learned immediately Shadona Clemens (phonetic) that the defendant had already left the house through the back door and in fact done so right after entering the house. And so that this wasn't an armed confrontation in any sense.

And, again, I think that what we're saying is that this did not create a substantial risk of death or serious bodily injury. That is a high standard, and I think that the cases

applying the adjustment reflect that the conduct to which this adjustment applies is much more egregious and much [10] more violent and reckless than was relevant in this case.

THE COURT: Thank you. Let's talk about the safety valve issue first because, obviously, if he's not safety valve eligible, whether this enhancement for reckless endangerment applies becomes less important. I don't say it's not relevant, but it becomes less important.

At issue here is whether Mr. Claiborne has satisfied all of the requirements of section 5(c)(1.2), which would allow the Court to sentence him below the mandatory 60-month sentence of imprisonment. And of course the safety valve provision in the guidelines is virtually identical to the statutory provision of section 3553.

The question is here is whether Mr. Claiborne did not use violence or a credible threat of violence in connection with this offense. And the information is undisputed that he did not make any oral threats of violence to any individual: Miss Clemens, her children, her daughter, or anyone. He did not display a weapon. He made no suggestion of committing a violate act. He was trying to get away. That was his goal.

He had no physical contact with anyone in the course of running through that house. And while going through someone's home uninvited under any circumstances but certainly under these circumstances is something that should not happen, I don't believe it rises to the level of "use of [11] violence or a credible threat of violence." There was no threat of violence at all.

I am sure that the young woman who was in the kitchen was quite disturbed and perhaps frightened by some stranger running through her home. But, again, that doesn't create a credible threat of violence. And, again, there was no actual use of violence. So I believe that, in light of the factors, Mr. Claiborne is entitled to be considered under the safety valve. And so the court is free to sentence him below the mandatory five-year minimum.

Now, that same conduct has to be evaluated in the context of section 3(c)(1.2) which provides that, "The defendant's offense level is to be increased by two levels if he created a substantial risk of death or serious bodily injury to any other individual in the course of fleeing from a law enforcement officer."

What is critical here is the language of section 3(c)(1.2). That language is written in terms of the creation of a substantial risk of death or a substantial risk of serious bodily injury. There doesn't appear to be any claim here that Mr. Claiborne presented a substantial risk of death to any individual based his conduct. And the information that I have, in my view, does not rise to the level of a substantial risk of serious bodily injury.

There is no information that has been presented to [12] me concerning the officers. I presume they were armed; but whether they had their guns drawn when they came to Mrs. Clemens' home or when he entered the home; whether there was some mention of a shot having been fired or Miss Clemens having heard a shotgun. There is no connection between that and the situation involving Mr. Claiborne. I don't know if the police were shooting at him or even what Mrs. Clemens heard was in fact a gunshot.

There isn't even enough information to tell me how much time passed between when Mr. Claiborne ran through the home and whether the police arrived; whenever they on are foot; were they in a car? How did they approach the house? How much time had passed? How long had he been gone? What were the police in so-called "hot pursuit" of this individual or were they just looking for him? It is not clear.

And because of this limited information, I don't believe that it has been shown sufficiently that Mr. Claiborne presented a substantial risk of death or substantial risk of bodily injury to any individual in the course of his flight from the police. So I will sustain the defendant's objection to the two-level increase of his offense level under section 3(c)(1.2). I believe those are all the objections. Right?

MR. DWYER: Yes, Your Honor.

THE COURT: Okay. And just so the record is clear, [13] while the Court gives consideration to the sentencing Guidelines, the Court is not required to follow them; however, I think that the guidelines are certainly instructive and will provide some guidance to the court in determining what's an appropriate sentence in this case.

Mr. Claiborne, do you want to step up to the podium, please? Mr. Claiborne, have you had enough time to read the presentence Report and discuss it with your lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. The Court will adopt the factual statements of the report as its Findings of Fact. Mr. Dwyer, is there any reason why sentence should not be imposed at this time?

MR. DWYER: No, Your Honor.

THE COURT: Mr. Stevens?

MR. STEVENS: No, Your Honor.

THE COURT: I am sorry. Mr. Claiborne, is there anything that you want to say before sentence is imposed?

THE DEFENDANT: No, ma'am.

THE COURT: Mr. Dwyer?

MR. DWYER: Thank you, Your Honor. With the Court's sustaining of the objection and deciding that the safety valve applies, I believe that looking at the Sentencing Guidelines for productive purposes in this case that the offense level would be 20 – excuse me – and that the criminal history category one. And under the Sentencing Guidelines, the range would be –

THE COURT: 46 to 57 months, I think. And I right?

MR. DWYER: Your Honor, I believe it would be 33 to 41.

THE COURT: Okay. What would his offense level come down to? He gets a reduction for the –

MR. DWYER: The Court are correct.

THE COURT: – for the 5(c)(1.2). Right?

MR. DWYER: You have demonstrated why I am a lawyer and not an accountant, Your Honor. It is 21, and Mr. Stevens is correct. And the Court was correct. It is 37 to 46, and that number we had used in our objections too. So thank you, Your Honor. That, as we indicated in our

objections, in light of Booker, we think that even the 37- to 46-month range is too high and would ask the Court to consider of the factors.

We've laid out those factors: The history and character of Mr. Claiborne; the needs of the public; the nature of this offense. And I want also we need to consider, you know, how the sentencing Commission crafted its guidelines in crack cases, which we've gone into in our objections. And I won't go through all of that again, Your Honor. I know that the court has read and considered that.

I would just make mention of a person who's no [15] longer with us, and I am thinking of Judge Cahill. And, you know, Judge Cahill and I didn't always agree on everything; and we had battles about what was appropriate and inappropriate in his courtroom. But I never left feeling he didn't consider justice his primary goal. And Judge Cahill used justice not in the sense that you see so often in popular literature and just in everyday usage which is, "Bring him to justice or we're going to get justice" in the sense of revenge. I really think Judge Cahill looked at both sides and weighed the community's interest and weighed the defendant's interest and weighed the good of the public in general in making his decisions.

And I bring him up because I think one of the most eloquent things he ever wrote was his decision in which he found in the disparity between crack and powder cocaine violated the Constitution. His opinion was scholarly. It was eloquent and empassioned almost in finding that this was a very troubling distinction and unconstitutional.

The Eighth Circuit saw otherwise. But as we indicated briefly in our objections – and I am sure that the Court knows – everybody other than congress that has

investigated that disparity subsequent has determined that it is in fact unfair and unreasonable. And it is not even supported by the public anymore. And it is that distinction that drives the length of the sentence under the guidelines, [16] and I think that the court should take that into account in crafting a sentence.

As we've indicated in the objections, if this were a powder cocaine case, Mr. Claiborne would be looking not even at a mandatory minimum; and his sentence we believe would be six to twelve months. Crack exists on a market-driven basis. It is much easier to sell small amounts of cocaine to poor people if you can make it hard so that you can break it up rather than have to measure out tiny quantities of powder. That's the reason that I believe crack exists. It is the same thing as powder cocaine.

Now, I don't want to distract us by reopening that whole debate. But I think that the existence of a controversy about that is important; and I think that the sentence being grounded under the guidelines principally on that distinction renders it suspect and I think inappropriate in Mr. Claiborne's case.

You know, Mr. Claiborne is a very young man from my perspective. He is not much older than my children. And my children aren't very old. I started late. But I see Mario, and I don't mean to diminish him in any sense by referring to him by his first name. But I've had a lot of contact with him over the course of representing him. More than many clients. I've had long talks in his office. I've been able to get him on the phone. I can tell you that he is a very [17] kind young man. I think tell you he is a very nervous young man. A very risk-averse young man.

In light of what I know about him, it is deeply distressing that he got himself involved in selling drugs. I think he realizes what a horrible mistake that was. And I use the word "mistake" with some trepidation, because I always tell clients not to use that word, because it implies something that you can erase like an arithmetic mistake with a pencil. It is not that, and he knows that.

But this is a young man who, for the most part, has been trying to do the right thing. And he's succeeded recently. He has had no bond violations while he has out on bond. He supports his children. He supports his wife. They both work. They're trying to do the right thing. His family is here in the courtroom today. They depend on him.

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As you read the letter from his mother-in-law – and I'll use that term or lack of explanation – she values him highly as well. He accepted responsibility in this case. He walked in and pled guilty and ended up pleading guilty to a superseding indictment, because we could not reach an agreement with the government. And, as a consequence, they added a charge tot indictment. So the original indictment went from one to two counts in the superseding indictment, and he accepted responsibility for all of that.

I think that, given direction and patience and [18] compassion, that this is a young man who is ultimately going to succeed in life. I think that success is important for him, and I think it is important for his children. I think it is important for the community. I am not here to ask the court to award merit badges or some of accolades to Mr. Claiborne.

One of the things my father said to me often enough that I got very tired of it as a child is that, "You don't get points for stopping at red lights." And I don't tell the court about Mr. Claiborne's success with his family or having a job as I agree that stopping at red lights you're supposed to do that. But it is the picture of the whole person that I want the court to see this morning in sentencing Mr. Claiborne.

This is not a young man who is vicious or in need of incapacitation or a danger to the community. This is a young man who has made serious errors; who has rectified those errors I believe by straightening his life out. He did it with the help of the criminal justice system, it is not the way you want somebody to come to the wisdom and understanding at least to the extent that he has it today. But there has been some success in that regard. And I would like court to continue the momentum of that success by being compassionate here this morning and sentencing him to considerably lower than what the guidelines would call for. Thank you.

[19] THE COURT: Thank you. Mr. Stevens?

MR. STEVENS: Thank you, judge. I would point out, as Mr. Dwyer did, that Judge Cahill's opinion, though well-reasoned, was reversed; and that issue has been decided over and over again. I won't belabor the point. But powder cocaine has been found repeatedly as a legal issue as not to be the same as crack cocaine. I would point out that if this were a meth case or an LSD case, there would you be a similar penalty or even higher penalty and would point out that there's plenty of research to show that both of those crimes are, in the vast majority of cases, white defendants.

I don't think that's at all an issue here. As Mr. Dwyer pointed out, Congress has repeatedly said that these are the correct penalties for this sort of crime. And it seems to me that, in the vast majority of cases, when you're interpreting a statute to sentence someone, Congress is the only one that matters. It is their opinion that is the only one that matters on this issue.

The letter from the mother-in-law indicates that Mr. Claiborne cleaned his life up three years. I am not going to quibble with dates. But the second to the two counts in this case was less than a year-and-a-half ago. It seems to me that she may simply just not know what Mr. Claiborne has been up to in the last three years. Specifically, in November of 2003 and May of 2003.

[20] Also, judge, we had issues here today regarding safety valve and the reckless endangerment during flight issue. And I would just point out that the safety valve, by requiring the defendant have no criminal history points, seems to presume that a defendant with no criminal history portion is not a recidivism risk. And as the government pointed out in its Memorandum, Mr. Claiborne did plead guilty to two separate crack crimes six months apart.

So I am not sure that the safety valve applies under its language, that this is not a somewhat different case for most safety valve cases for that reason. It is a kind of a quirk of the guidelines in a case like this essentially Mr. Claiborne gets one of those incidents for free. His penalty will not reflect that it is two separate crack cocaine incidents. And his penalty would be no different if it were one, but he's pled guilty to two.

And finally, judge, the Court found that there was no a substantial risk due to Mr. Claiborne's flight; and that if I understand the court, there was at least some risk. And I would ask that the court to take that into consideration also. Thank you, judge.

THE COURT: Thank you. Well, as I said before, the Court considers the Sentencing Guidelines in determining what's an appropriate sentence. And I think that, in light of the Court's ruling on the objections, I am still not clear [21] what the guideline range comes down to. I thought you said 37 to 46 months, but I thought it was higher. Am I missing something?

MR. DWYER: Your Honor, if he is eligible for the safety valve, he'd have a two-level reduction under 3(c)(1.1) –

THE COURT: So that's basically four point taken off.

MR. DWYER: Yes, Your Honor.

THE COURT: Four levels coming down. So that brings him down to 21 –

MR. DWYER: 21.

THE COURT: – 21? Okay. I got you now. Okay. Mr. Claiborne, in reading the Presentence Report, which is essentially all the information that I have about you, I couldn't quite figure out what is going on in your life. You are what? 21?

THE DEFENDANT: Yes, ma'am.

THE COURT: You've gotten yourself involved in selling drugs. You pled guilty to two separate counts, two

separate sales. You were arrested after the first sale, but that didn't stop you. You went ahead and sold again.

Now, why you were willing to take that risk, I don't know. And I can't figure out if you were just unlucky or if you're stupid. I hope you are not stupid, because if you [22] are, you're going to do this again. Selling drugs is not the way to support yourself. It was not the way to support your family. Because, as you stand here now, you are about to go to prison. You're not going to be able to support your family from prison.

So you need to ask yourself: Is there something else I can do to provide financial support for myself and my family that will not place me in jeopardy of being taken away from them and incarcerated for – but for your being granted these objections – a minimum of 60 months. That's a long time for someone to be sent away from their family.

Even though I've granted your objections, under the Sentencing Guidelines, you're still looking at a minimum of three years being taken away from St. Louis and from your family and from everything that you know. Now, have you given any thought to what you might do differently next time?

THE DEFENDANT: Yes, ma'am.

THE COURT: Well, I hope you give some serious thought to that, because I am very concerned that, because you're so young, you don't fully realize the effect of what you've done has on your family and what it is going to have on you and your future. And, you know, you mentioned Judge Cahill earlier. And one of the things I think I've inherited from him, aside from inheriting his docket

when his took senior status, I've gotten used to lecturing people. He was [23] really good at that. I can't come close. But it really does disturb me when I see someone of your age in a federal courtroom about to go to prison. Most 21-year-olds are not out there selling drugs, Mr. Claiborne.

What you are doing is not normal behavior, and it doesn't have to be the only thing that you do in life. I know there are a lot of things you want for yourself and for your family. But you are going to have to learn how to get those things through legitimate means, just like the majority of people do. And you may have to do without some things.

You don't have to have the latest music or the latest fashions, even though you want them, because your freedom has got to be more important to you than some fad. Okay? when you get to the point where you value your freedom more, I think that you will change your whole attitude about what you do in life.

Now I want to talk to you about Mrs. Clemens. This lady had every right to have her door open on a nice day while he was outside with her children. You had absolutely no right to run through her house. Going into someone's house in that way is a personal violation. I understand you didn't threaten anyone. And your only thought probably was, "How do I get away from the police?" But you had no business involving Mrs. Clemens and her family in your crime. That is unforgivable.

[24] I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you

did was very serious. You committed two serious felony crimes.

However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.

I don't think that that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – a much amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

As I said before, I do believe some term of imprisonment is appropriate in your case. And I hope that you don't view this as just the cost of doing business, and I hope that you never get to the point where you feel that the risk of going to prison is worth it, because it never is.

[25] Having said that, it is the judgment of the Court that the defendant, Mario Claiborne, be committed to the custody of Bureau of Prisons to be imprisoned for a term of 15 months on Count 1 and 15 months on count 2; both terms to be served concurrently.

After you are released from prison, Mr. Claiborne, you'll be placed on supervised release for three years on Count 1 and three years on Count 2. Both terms of supervision will also run concurrently.

Within 72 hours after you are released from the custody of the Bureau of Prisons, you must report in

person to the Probation Office in the district to which you are released. While you are on supervised release, you will have to compile with the standard conditions of supervision that the court has established and you have to comply with some additional conditions. The first is that you not use any corroborates unlawfully; and that you submit to a drug test within the first 15 days of your supervised release term and submit to at least two periodic drug tests after that.

You will also be required to participate in a drug abuse treatment program as directed by the Probation Office. The Probation Office may direct you to a community corrections center; a comprehensive sanctions center; or some other inpatient program or an outpatient program. You will have to pay the cost of participating in that program, and [26] the amount of your payment will be determined by the Probation Office on a sliding fee scale.

You will have the opportunity to enroll in GED classes while you are incarcerated and to obtain your GED. If I don't have your GED by the time you are released from prison, then as a further condition of supervised release, you will have to participate in GED classes as directed by the Probation Office.

As I said before, I was very disturbed by the conduct that you've engaged in in fleeing from the police and your dragging in Mrs. Clemens into all of this. So as a further condition of supervised release, I am going to require that you write a letter of apology to Mrs. Clemens and her family. That letter will be submitted to the U.S. Attorney's office, who will then forward that letter to Mrs. Clemens.

And in that letter, I hope that you will sincerely apologize for breaking into her house and for disturbing

her and her family and for frightening her and her children by your conduct.

THE DEFENDANT: Yes, I did that already. But I'll do it again.

THE COURT: If you've done it already, then I don't require you to do it again.

MR. DWYER: That apology has been expressed orally, [27] Your Honor. But we're happy to write a letter.

THE COURT: I want you to write a letter. Okay. The defendant does not have the ability to pay a fine. So none will be imposed. There is a 100-dollar assessment for each of the two counts of conviction for a total of $200. That assessment is due immediately. Was there a waiver of appeal?

MR. DWYER: No, Your Honor, there was not.

THE COURT: Mr. Claiborne, you have the right to appeal this sentence. And if you wish to appeal, you must file a Notice of Appeal within ten days from today.

THE DEFENDANT: Yes, ma'am.

THE COURT: If you don't file the notice on time, you will lose your right to appeal. You are entitled to have an attorney appointed to represent you on appeal and to file your Notice of Appeal free of charge. If you decide to handle the appeal without a lawyer, all you need to do is contact the Clerk's Office; and someone there will prepare and file the notice for you. Do you understand your appeal rights?

THE DEFENDANT: Yes, ma'am.

THE COURT: Would you me to make a recommendation to the BOP?

MR. DWYER: Your Honor, I'd just ask them to incarcerate him as close as possible to the St. Louis area.

[28] THE COURT: Okay. I'll include that recommendation in the judgment. Okay. I don't know what Judge Stohr's policy is, but I am sure you all know what my policy is, which is that detention is mandatory unless there is some circumstances that would make this an exception.

MR. DWYER: Your Honor, because both Mr. Claiborne and the mother of his children are employed full time, they work at other hours so that there is something to take care of the children, and they're very young children. So that until Thursday of last week, this was going to be handled by Judge Stohr, and they have not made arrangements alternatively for child care, since that time to cover the period between sentencing and the time he would face imprisonment. I think Judge Stohr's policy is not so automatic as yours, but I think that the child care needs; the fact that he has not had any violations while on pretrial release under the circumstances of this case would be sufficiently exceptional to adjust a voluntary surrender.

THE COURT: Okay. Mr. Stevens, what is the government's position?

MR. STEVENS: Judge, on that issue, I don't know of any exceptional circumstances. And at this time, if the Court would indulge the government, I would like to interpose an objection on the sentence of 15 months on Counts 1 and 2 as well as for purposes of the record to the

court's findings [29] and conclusions regarding the reckless endangerment enhancement.

THE COURT: All right. Thank you. Well, you know, I am not unsympathetic to child care needs. But Mr. Claiborne has known for some time that he was going to be sentenced and whether he knew that he would be remanded on the day of sentencing is really not that material. He knew that he faced a possibility of being incarcerated at some point. And so arrangements should have been made sooner for scheduling child care.

I understand that there have not been any violations of the pretrial release conditions. And that's certainly to Mr. Claiborne's credit, but I don't believe that the circumstances that you've presented to me warrant an exception from the mandatory detention provision. So, Mr. Claiborne, you will be remanded to the custody of the marshal.

Is there anything else from government?

MR. STEVENS: No, Your Honor. Thank you.

THE COURT: Mr. Dwyer?

MR. DWYER: Thank you, Your Honor.

(Whereupon, the proceedings concluded at 10:31 a.m.)

[Certification Omitted In Printing]

United States District Court
Eastern District of Missouri

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
v.	(Filed Mar. 28, 2005)
MARIO CLAIBORNE	CASE NUMBER: 4:04CR423DJS
	USM Number: 31227-044
	Michael Dwyer
	Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) I (One) and II (Two of the Superseding Indictment on December 3, 2004

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 841(a)(1)	Distribution of Cocaine Base	May 14, 2003	I (One)
21 USC § 844	Possession of Cocaine Base	November 2, 2003	II (Two)

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Counts(s) _____ dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 28, 2005
Date of Imposition of Judgment

/s/ Carol E. Jackson
Signature of Judge

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
Name & Title of Judge

March 28, 2005
Date signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 15 months.

The defendant shall be imprisoned for a term of fifteen months on count one and fifteen months on count two of the superseding indictment, each term to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

the defendant shall be assigned to a facility as close to Saint Louis, Missouri as possible to the extent that this recommendation is consistent with the policies of the United States Bureau of Prisons.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States marshal for this district:

☐ at _____ a.m./pm on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

MARSHALS RETURN MADE ON SEPARATE PAGE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 years.

The defendant shall be on supervised release for a term of three years as to count one and for a term of three years as to count two of the superceding indictment, each term to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, as defined in 18 U.S.C. § 921. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The Defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT AS WELL AS THE FOLLOWING ADDITIONAL CONDITIONS:

1. THE DEFENDANT SHALL REFRAIN FROM ANY UNLAWFUL USE OF A CONTROLLED SUBSTANCE AND SUBMIT TO A DRUG TEST WITHIN 15 DAYS OF RELEASE ON SUPERVISED RELEASE AND AT LEAST TO TWO PERIODIC DRUG TESTS THEREAFTER FOR USE OF A CONTROLLED SUBSTANCE.

2. THE DEFENDANT SHALL PARTICIPATE, AS DIRECTED BY THE PROBATION OFFICER, IN A DRUG OR ALCOHOL ABUSE TREATMENT PROGRAM

WHICH MAY INCLUDE SUBSTANCE ABUSE TESTING, COUNSELING, RESIDENCE IN A COMMUNITY CORRECTIONS CENTER, RESIDENCE IN A COMPREHENSIVE SANCTIONS CENTER, OR IN-PATIENT TREATMENT IN A TREATMENT CENTER OR HOSPITAL. THE DEFENDANT SHALL PAY FOR THE COSTS ASSOCIATED WITH SUBSTANCE ABUSE COUNSELING BASED ON A COPAYMENT SLIDING FEE SCALE APPROVED BY THE UNITED STATES PROBATION OFFICE. CO-PAYMENTS SHALL NEVER EXCEED THE COSTS OF TREATMENT.

3. THE DEFENDANT SHALL PARTICIPATE IN A GED OR HIGH SCHOOL EQUIVALENCY PROGRAM. IF THIS PROGRAM IS NOT COMPLETED WHILE IN THE CUSTODY OF THE BUREAU OF PRISONS, THEN THE DEFENDANT SHALL OBTAIN A GED BEFORE THE EXPIRATION OF THE TERM OF SUPERVISED RELEASE AND AT THE DIRECTION OF THE PROBATION OFFICER.

4. THE DEFENDANT SHALL COMPLETE A LETTER OF APOLOGY DIRECTED TO MS. CLEMONS, WHICH SHALL BE DELIVERED TO THE UNITED STATES ATTORNEY IN THIS DISTRICT TO BE FORWARDED TO MS. CLEMONS.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on sheet 6

	Assessment	Fine	Restitution
TOTALS	$ 200.00		

☐ The determination of restitution is deferred until . *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:			

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title

18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $200 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, or ☐ E below; or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or ☐ F below; or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Payment shall be made to the Clerk of Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 4:04CR423 DJS
MARIO CLAIBORNE,	)	
Defendant.	)	

NOTICE OF APPEAL

(Filed Apr. 25, 2005)

COMES NOW, the United States of America, by and through James G. Martin, United States Attorney for the Eastern District of Missouri, and Cristian M. Stevens, Assistant United States Attorney for said District, and states that notice is hereby given that the United States of America appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on March 28, 2005.

Respectfully submitted,

JAMES G. MARTIN
United States Attorney

/s/ *Cristian M. Stevens*
CRISTIAN M. STEVENS (#98871)
Assistant United States Attorney
111 South 10th Street, Room 20.333
St. Louis, Missouri 63102
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[Certificate Of Service Omitted In Printing]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America,	*	
	*	
Plaintiff-Appellant,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern
	*	District of Missouri.
Mario Claiborne,	*	
	*	
Defendant-Appellee.	*	

Submitted: December 13, 2005

Filed: February 27, 2006

Before LOKEN, Chief Judge, WOLLMAN and RILEY, Circuit Judges.

LOKEN, Chief Judge.

Mario Claiborne pleaded guilty to two counts of possessing and distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 844(a). The district court determined that Claiborne's advisory guidelines sentencing range is 37 to 46 months in prison and imposed a 15-month sentence. The government appeals the sentence as unreasonable under 18 U.S.C. § 3553(a). We agree and remand for resentencing.

In May 2003, Claiborne was arrested for attempting to sell 0.23 grams of cocaine base to an undercover police

officer. Six months later, police approached Claiborne engaged in what appeared to be a drug deal. He fled through the house next door, throwing down a plastic baggie containing 5.03 grams of cocaine base. Claiborne was charged with and pleaded guilty to distributing cocaine base during the first incident and possessing cocaine base during the second.

At sentencing, the district court granted Claiborne "safety valve" relief from the five year mandatory minimum sentence under 18 U.S.C. § 844(a). *See* 18 U.S.C. § 3553(f); U.S.S.G. §§ 2D1.1(b)(7), 5C1.2. The court also rejected the government's position that he should receive a two-level increase for reckless endangerment because he fled through a nearby residence. *See* U.S.S.G. § 3C1.2. These rulings resulted in a guidelines sentencing range of 37 to 46 months in prison, which is not at issue on appeal. Recognizing that the guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), the district court sentenced Claiborne to 15 months in prison, concluding that "the 37 month low end of the range is, in my view, excessive" because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future. The government appeals, arguing that 15 months is an unreasonable downward variance from the guidelines range.

Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. *United States v. Haack*, 403 F.3d 997,

1002-03 (8th Cir.), *cert. denied* 126 S.Ct. 276 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of the other statutory concerns" in § 3553(a). *Booker*, 543 U.S. at 245-46. When the district court has correctly determined the guidelines sentencing range, as in this case, we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion.

The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable. See *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). When the district court varies from the guidelines range based upon its analysis of the § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable." *United States v. Mashek*, 406 F.3d 1012, 1017 (8th Cir. 2005); *see Haack*, 403 F.3d at 1004. "Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005) (citation omitted). A "range of reasonableness" is within the court's discretion. *United States v. Saenz*, 428 F.3d 1159, 1165 (8th Cir. 2005).

Here, the district court imposed a 15-month sentence when the bottom of Claiborne's advisory guidelines range was 37 months. This is a sixty percent

downward variance. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

For the foregoing reasons, we conclude that the sentence is unreasonable and remand to the district court for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.05-2198

United States of America,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern
	*	District of Missouri.
Mario Claiborne,	*	
	*	
Appellee.	*	

JUDGMENT

(Filed Feb. 27, 2006)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

February 27, 2006

ORDER ENTERED IN ACCORDANCE WITH OPINION

/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America, Appellant, vs. Mario Claiborne, Appellee.	* * * * * * * *	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Smith would grant the petition for rehearing en banc.

Judge Gruender did not participate in the consideration or decision of this matter.

(5128-010199)

April 27, 2006

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

127 S.Ct. 551

Supreme Court of the United States
Mario CLAIBORNE, petitioner,
v.
UNITED STATES.
No. 06-5618.

Nov. 3, 2006.

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to the following Questions: 1) Was the district court's choice of below-Guidelines sentence reasonable? 2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?